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No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

AT&T CORP., *et al.*,

Petitioners,

v.

IOWA UTILITIES BOARD, *et al.*,

Respondents.

AT&T CORP., *et al.*,

Petitioners,

v.

CALIFORNIA, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PETITION FOR A WRIT OF CERTIORARI

MARK C. ROSENBLUM
ROY E. HOFFINGER
295 North Maple Avenue
Basking Ridge, NJ 07920
(908) 221-3539

DAVID W. CARPENTER *
PETER D. KEISLER
SIDLEY & AUSTIN
One First National Plaza
Chicago, IL 60603
(312) 853-7237

Counsel for AT&T Corp.

[Additional Counsel Listed on Inside Cover]

November 17, 1997

* Counsel of Record

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DANA FRIX
SWIDLER & BERLIN, CHARTERED
3000 K Street, N.W.
Suite 300
Washington, DC 20007
(202) 424-7500
Counsel for ACC Corp.

CHARLES H. HELEIN
ROBERT M. MCDOWELL
HARISHA J. BASTIAMPILLAI
HELEIN & ASSOCIATES, P.C.
8180 Greensboro Drive
Suite 700
McLean, Virginia 22102
(703) 714-1300
Counsel for America's Carriers Telecommunications Association

GENEVIEVE MORELLI
1140 Connecticut Avenue, N.W.
Suite 220
Washington, DC 20036

ROBERT J. AAMOTH
EDWARD A. YORKGITIS, JR.
KELLEY DRYE & WARREN LLP
1200 19th Street, N.W.
Suite 500
Washington, DC 20036
(202) 955-9600
Counsel for Competitive Telecommunications Association

JAMES M. SMITH
Vice-President-Law and Public Policy
3000 K Street, N.W.
Suite 300
Washington, DC 20007

DANA FRIX
RUSSELL M. BLAU
SWIDLER & BERLIN, CHARTERED
3000 K Street, N.W.
Suite 300
Washington, DC 20007
(202) 424-7500
Counsel for Excel Telecommunications, Inc.

JAMES R. JACKSON, JR.
GENERAL COMMUNICATIONS, INC.
2550 Denali Street
Suite 1000
Anchorage, AK 99503
(907) 265-5545
Counsel for General Communications, Inc.

DANIEL L. BRENNER
NEAL M. GOLDBERG
DAVID L. NICOLL
1724 Massachusetts Ave., N.W.
Washington, DC 20036
(202) 775-3664
Counsel for National Cable Television Association

LEON M. KESTENBAUM
JAY C. KEITHLEY
H. RICHARD JUHNKE
1850 M Street, N.W.
11th Floor
Washington, DC 20036
(202) 828-7437
Counsel for Sprint Corporation

CHARLES C. HUNTER
CATHERINE M. HANNAN
HUNTER COMMUNICATIONS LAW GROUP, P.C.
1620 I Street, N.W.
Suite 701
Washington, DC 20006
(202) 293-2500
Counsel for Telecommunications Resellers Association

CATHERINE R. SLOAN
RICHARD L. FRUCHTERMAN, III
RICHARD S. WHITT
1120 Connecticut Avenue, N.W.
Suite 400
Washington, DC 20036
(202) 776-1550
Counsel for WorldCom, Inc.

QUESTIONS PRESENTED

The Telecommunications Act of 1996 was enacted to "shift monopoly [local telephone] markets to competition as quickly as possible." To that end, it adopts new federal requirements that allow new entrants to use essential facilities and services that are controlled by the incumbent local monopolists. This case concerns the authority of the Federal Communications Commission ("FCC") over these new requirements of the Communications Act, and the substantive validity of two regulations that the FCC has determined are crucial to opening local markets to competition. The questions presented are:

1. Whether, despite the explicit grants of authority to the FCC, the Eighth Circuit correctly held that the FCC has no "jurisdiction" either to enforce or to adopt regulations to implement myriad new federal requirements of the Communications Act, that the pricing and some non-pricing requirements of the Act are within the exclusive jurisdiction of state utility commissions to implement, and that the FCC's authority over the remaining non-pricing requirements is limited to adopting narrow interpretative rules?

2. Whether, despite the FCC's undisputed findings that the rule is essential to local competition and supported by the ordinary meaning of the terms of the Act, the Eighth Circuit lawfully invalidated the FCC regulation that allows new entrants to obtain and use existing combinations of network elements and that precludes incumbent monopolists from breaking those elements apart in order to impose additional costs and service outages on their competitors?

3. Whether, despite its acknowledgment that the rule is supported by the Act's terms, the Eighth Circuit lawfully invalidated the FCC's most-favored-nation rule on the basis of its "belief" that the FCC was wrong in holding that the rule would better foster negotiations and more effectively promote the Act's goals?

LIST OF PARTIES AND AFFILIATES

The parties to the proceedings in the Eighth Circuit are listed in the captions of the decisions below, see Appendix A, 1a-4a; Appendix D, 73a-79a, and in Appendix E, *infra*.

Pursuant to Supreme Court Rule 29.6, petitioners state as follows:

ACC Corporation has no parent company. It has a subsidiary, ACC TelEnterprises Ltd., which has issued stock to the public.

AT&T Corp. has no parent company. It has an equity interest in the following publicly traded companies:

LIN Television Corporation;
American Mobile Satellite Corporation;
PriCellular, Inc.;
General Magic, Inc.;
Novell, Inc.;
Lanser Wireless Inc. (Canada); and
SmartTone Telecommunications Holdings Ltd. (Hong Kong).

AT&T owns an interest in the following non-publicly traded company, which has public debt outstanding:

AT&T Credit Holdings, Inc.

America's Carriers Telecommunications Association ("ACTA") is a national association with over 200 members, the core membership of which is comprised of small to mid-sized telecommunications carriers providing competitive long distance services on a regional and national basis. ACTA has not issued shares or debt securities to the public. ACTA does not have any parent companies, subsidiaries or affiliates that have issued shares or debt securities to the public.

Competitive Telecommunications Association ("CompTel") is an industry association representing the nation's competitive telecommunications carriers, with over 200

members. CompTel has not issued securities to the public, and it does not have any publicly-owned parents, subsidiaries, or affiliates.

Excel Telecommunications, Inc. ("Excel") is a wholly owned subsidiary of Excel Telephone, Inc. which, in turn, is wholly owned by Excel Communications, Inc., a publicly traded company. Excel has no non-wholly owned subsidiaries.

General Communications, Inc. ("GCI") is a publicly traded corporation. GCI, Inc., a wholly owned subsidiary of GCI, is an issuer of publicly traded debt securities. MCI owns 19.3% of the equity of GCI and Kearns-Tribune, Corporation owns 0.9% of the equity of GCI.

The National Cable Television Association, Inc. ("NCTA") is the principal trade association of the cable television industry in the United States, representing the interest of owners and operators of cable television systems serving over 80 percent of the nation's cable households. Its members also include cable programmers, cable equipment manufacturers and others interested in, or affiliated with, the cable television industry. NCTA has no parent companies, subsidiaries or affiliates whose listing is required by Rule 29.

Sprint Corporation has no parent companies. Its only nonwholly owned subsidiary is Central Telephone Company (which in turn has wholly owned subsidiaries).

Telecommunications Resellers Association ("TRA") is an incorporated trade association representing over 650 resale carriers and their underlying product and service providers. TRA has no parent companies or subsidiaries.

WorldCom, Inc. ("WorldCom"), a Georgia corporation, is organized for the purpose of engaging in telecommunications and related businesses. WorldCom common stock is traded on The Nasdaq National Market ("NASDAQ") under the symbol "WCOM," and its depositary shares also are traded on NASDAQ under the

symbol "WCOMP." On December 31, 1996, a wholly owned subsidiary of WorldCom merged with MFS Communications, Inc. ("MFS"), a Delaware Corporation. MFS previously was publicly traded on NASDAQ under the symbol "MFST," and its depositary shares were traded on NASDAQ under the symbol "MFSTP." As of November 17, 1997, WorldCom has no parent company or non-wholly owned subsidiary companies.

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OPINIONS BELOW

The initial opinion of the Eighth Circuit reviewing the FCC's *First Report and Order* is reported at 120 F.3d 753 (App. 1a) and the opinion granting in part and denying in part the petitions for rehearing of that decision (App. 69a) is not yet reported. The opinion of the Eighth Circuit reviewing the FCC's *Second Report and Order* (App. 73a) is reported at 124 F.3d 934. The FCC's *First Report and Order* and its *Second Report and Order* in its local competition rulemaking are reported at 11 F.C.C.R 15499 (1996) and 11 F.C.C.R. 19392 (1996). The relevant portions of these FCC orders are reproduced in the appendix (App. 131a-353a).[1]

JURISDICTION

The order of the Eighth Circuit granting in part and denying in part petitions for rehearing of its decision on the FCC's *First Report and Order* was entered on October 14, 1997. The Eighth Circuit's decision on the FCC's *Second Report and Order* was entered on August 22, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1). See also S. Ct. R. 12.4.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved in this case are Sections 1, 2, 4(i), 10, 201, 208, 251-61, and 303(r) of the Communications Act, 47 U.S.C. §§ 151, 152, 154(i), 160, 201, 208, 251-61, and 303(r). They are reproduced in Appendix F.

STATEMENT OF THE CASE

This case arises under the landmark Telecommunications Act of 1996 ("1996 Act"), Pub. L. No. 104-104, 110 Stat. 56 (1996), which was enacted to "shift monopoly [local telephone] markets to competition as quickly

[1] Pursuant to discussions with the Clerk's Office, 15 copies of these orders have been lodged with the Clerk of the Court.

as possible."[2] Congress thus adopted new "local competition" provisions of the Communications Act (47 U.S.C. §§ 251-61) that broadly preempt contrary state laws, that establish three separate modes of competitive entry in local telephone markets, and that contain strict time limitations in order to implement the new federal requirements rapidly. Petitioners are new entrants in these local markets, potential new entrants, and their associations, who are relying on these requirements to provide the competition to the local monopolies that the Act seeks to foster.

However, in the decisions under review, the Eighth Circuit eviscerated these requirements. First, the Eighth Circuit made "jurisdictional" rulings that it acknowledged to be unprecedented, that are contrary to decisions of other courts of appeals, and that will prevent the rapid implementation of the Act in accordance with its terms. Although the court recognized that the new local competition provisions are federal laws that preempt contrary state laws, the Eighth Circuit held that the Federal Communications Commission ("FCC") has no "jurisdiction" to enforce or to adopt uniform national rules to implement the pricing and many nonpricing requirements of the Communications Act. Under this holding, the implementation of these federal requirements is committed to several hundred separate state utility commission proceedings, followed only by actions in federal district courts. That would mean that the certainty and uniform national rules that Congress intended will emerge, if at all, only following years or decades of piecemeal litigation in federal district courts, courts of appeals, and, in some instances, this Court.

Second, even in those areas where the Eighth Circuit upheld the FCC's jurisdiction to adopt rules, the FCC has been prevented from implementing the Act's requirements. The Eighth Circuit limited the FCC's authority

[2] H.R. Rep. No. 104-204 at 89 (1995); *see also* Joint Explanatory Statement of the Comm. of Conference, H.R. Rep. No. 104-458 at 113 (1996); S. Rep. No. 104-23 at 1 (1995).

to the adoption of narrow interpretative rules. Even more significantly, the Eighth Circuit also vacated individual rules that were compelled by the language of the 1996 Act and by uniform decisions of other courts of appeals under the precursors to the Act, and that are critical to the rapid emergence of the local competition that Congress intended. In particular, even if it were economically feasible, it would take years or decades for fully redundant local telephone networks to be constructed throughout the nation, and the only entry vehicle that can permit the immediate nationwide introduction of competition to today's monopoly exchange and exchange access services is the use of "unbundled network elements." But the Eighth Circuit's decision would cripple and perhaps altogether preclude this mode of entry.

1. The Local Telephone Monopolies and the Historic State and Federal Regulation. Historically, all telephone services in the United States were provided by franchised local monopolists, which are known as "incumbent local exchange carriers" or "LECs." The LECs were allowed to construct and operate lines (called "local loops") that connect each home and business in their franchised territories to switches and other facilities that allow each telephone in the area to place calls to, and receive calls from, every other telephone. These local telephone services are called "local exchange services."

In addition, these local facilities are connected to long distance (sometimes called interexchange) facilities that carry long distance calls between local calling areas. Thus, AT&T, Sprint, MCI, and other long distance carriers must use LEC networks to originate or terminate their long distance services. These are known as "exchange access" services.

Regulation of LEC networks has always been divided between state and federal authorities. Section 2(b) of the Communications Act (47 U.S.C. § 152(b)) generally gives the states exclusive jurisdiction over "intrastate communications services," so state commissions have exclu-

sively regulated the rates for local exchange services (and for exchange access for intrastate long distance calls).

However, when LECs provide the "exchange access" services for interstate long distance calls, they are providing interstate services, which the FCC has regulated under §§ 2(a) and 201-205 of the Communications Act. More than 20% of the LECs' $100 billion in annual revenues are from *interstate* exchange access services.

Because of the enormous economies of scale that characterize some or all of the components of local telephone networks and the "prohibitive capital investment" that would be required to duplicate them, local telephone service has historically been found to be a natural monopoly. See *United States* v. *Western Elec. Co.*, 673 F. Supp. 525, 538 (D.D.C. 1987). Accordingly, the FCC and states formerly prohibited competition with LEC services.

2. The FCC's and the Federal Courts' Pre-1996 Efforts to Foster Competition with LECs. While LECs formerly had monopolies over all telephone services and facilities used in their franchised territories, the FCC has exercised its jurisdiction over interstate telephone services to open many of these services and facilities to competition. These efforts led to federal antitrust decrees as well.

For example, the FCC exercised its jurisdiction over interstate services to require the competitive provision of telephone sets and other "customer premises equipment" that formerly was part of monopoly local telephone service. The FCC ordered LECs to allow the interconnection of other vendors' equipment and to "unbundle" their customer premises equipment from their monopoly telephone services by stating separate prices for each and giving customers the option of purchasing only service from the LEC. The FCC adopted similar requirements of interconnection, unbundling, and cost-based rates to foster competition in inside wire and enhanced services. Courts of appeals upheld all these measures. See p. 25, nn.8-11, *infra*.

During this period, the FCC also sought to foster competition in the provision of interstate long distance services

by imposing a series of interconnection, unbundling, and related duties on LECs (and their long distance affiliates). These included requirements that LECs charge just, reasonable, and nondiscriminatory rates for exchange access services, and detailed interconnection, unbundling, and resale obligations.

Because these measures were less than fully effective (and applied only to interstate long distance services), the Justice Department filed a suit under the Sherman Act charging the largest LECs (the Bell Operating Companies of the then Bell System) with using their local monopolies to impede long distance competition. This suit was settled when the Bell System consented to a Decree that (1) precluded the Bell Operating Companies from providing interstate or intrastate long distance services so long as they had local monopolies and (2) required them to provide exchange access under nondiscriminatory terms and conditions, on an unbundled basis, and at cost-based rates. It imposed duties that were fully applicable to intrastate as well as interstate long distance services and preempted inconsistent state regulation. *United States* v. *American Tel. & Tel. Co.*, 552 F. Supp. 131, 153-160 (D.D.C. 1982), *aff'd sub nom., Maryland* v. *United States*, 460 U.S. 1003 (1983). A similar decree was entered against the nation's next largest LEC, GTE. *United States* v. *GTE*, 603 F. Supp. 730, 737-46 (D.D.C. 1984).

Finally, beginning in the late 1980s, the FCC sought to foster competition with the LECs' local exchange access services. It certified other firms to provide competing interstate exchange access services under 47 U.S.C. § 214, and the FCC ordered LECs to unbundle their exchange access services and facilities, to permit competing exchange access carriers to interconnect with the LECs at specific points, and also to allow these new entrants to "co-locate" their facilities (either physically or "virtually") with those of the LEC at FCC-approved rates. But the continuation of state law prohibitions on the provision of competitive intrastate services meant that these FCC orders created only limited opportunity for competition in the provision

of local telephone service, for it is not economical to provide interstate exchange access services to anyone except the largest customers unless a firm can also provide intrastate exchange services.

3. The 1996 Act and its Local Competition Provisions. In the 1996 Act, Congress sought to overcome all these obstacles and to establish a regime that would permit all the nation's residential and business customers to have choices for local telephone service. Congress did so by enacting a new subchapter of the Communications Act (47 U.S.C. §§ 251-61) which contains new federal requirements designed rapidly to eliminate all legal and economic barriers to entry.

These provisions expressly preempt all state laws, regulations, or orders that erect, maintain, or authorize legal or economic barriers to any form of local services. Section 253(a) invalidates any state or local requirement that has the "effect" of prohibiting "any entity" from "offering any intrastate or interstate service," and § 253(d) authorizes the FCC to preempt any state requirement found to violate § 253(a). See also § 251(d)(3) (standards for FCC to apply in "adopting" or "enforcing" regulations that preempt state requirements). And until the FCC adopts its "superseding regulations" under the new Act, § 251(g) codifies as FCC regulations the provisions of the AT&T and GTE consent decrees that preempt contrary state regulation of intrastate as well as interstate services.

Further, Congress was not content merely to preempt such state requirements. In addition, §§ 251 and 252 impose duties on incumbent LECs to allow new entrants to use the LECs' essential or other facilities to provide competing service, and they further contain requirements designed rapidly to convert these duties into operational interconnection arrangements.

In particular, in addition to duties that apply to new entrants and LECs alike (see § 251(b)), Section 251(c) of the Act imposes duties on all incumbent local exchange carriers (save those rural LECs who receive exemptions

under § 251(f)). These duties are designed to allow new entrants to provide local telephone service in any one or all of three separate ways.

First, § 251(c)(2) requires LECs to allow new entrants who construct their own facilities to offer competing "exchange and exchange access services" by "interconnect[ing]" their networks with those of the LECs under "rates, terms, and conditions" that are "just, reasonable, and nondiscriminatory." Interconnection is necessary to allow the new entrant's customers to place calls to and receive calls from the LEC's customers.

Second, § 251(c)(3) requires the LEC to provide nondiscriminatory access to "elements" of the LEC's network on an unbundled basis and under "rates, terms, and conditions that are just, reasonable, and nondiscriminatory" and that comply with the requirements of § 252(d)(1) that the rates be based on cost. Because this access is to allow new entrants to provide any "telecommunications service," it enables them to provide exchange access as well as exchange services.

Third, § 251(c)(4) requires the LEC to offer each of its retail services at "wholesale rates" and to allow new entrants competitively to resell the LEC's retail exchange services (but not to offer exchange access). The "wholesale rates" are computed by subtracting from the retail rates the costs that the LEC avoids when it operates purely as a wholesaler.

While these duties are subject to the general enforcement provisions of the Communications Act, the 1996 Act also adopts provisions designed to assure the rapid implementation of these new duties. In particular, § 251(d)(1) required the FCC to adopt regulations to implement the requirements of § 251 by August 8, 1996, and § 252 of the Act further establishes a procedure and strict time deadline through which competing carriers may obtain the arrangements that are required by § 251(b) and § 251(c). Section 252(a) provides that new entrants may, at any time, request that LECs negotiate and enter

into agreements that implement these arrangements. Section 252(b) provides for compulsory arbitration of the arrangements before state commissions (or the FCC) if no agreement is reached within 135 to 160 days, and § 252(e) requires the arbitration to be concluded within nine months of the request. §§ 252(b)(1), (b)(4)(C), (e)(4) & (e)(5).

In arbitrating open issues and in establishing conditions, state utility commissions are required to ensure that their decisions "satisfy the requirements of § 251 of the Act, including the regulations prescribed by the [FCC] pursuant to section 251." § 252(c)(1). When state commissions make determinations under this section, the Act provides that an aggrieved party may bring an action in an appropriate federal district court to determine whether the arbitrated agreement "meets the requirements of section 251 and this section [252]." § 252(e)(6). Further, once an agreement becomes final, Section 252(i) permits other competing carriers to obtain individual interconnection, network elements, or wholesale services for resale under the same terms and conditions.

4. The FCC's Rules. Pursuant to § 251(d)(1) and its general grants of rulemaking authority, the FCC issued a single notice of proposed rulemaking to implement the local competition provisions of the Act. On August 8, 1996, following extensive notice and comment, the FCC issued two separate rulemaking orders.

In its *First Report and Order*, the FCC adopted rules that define (1) the pricing and other requirements that §§ 251(c) and 252 impose on incumbent LECs, (2) some of the duties that § 251(b) imposes on all providers of local service, and (3) the conditions in which rural LECs can obtain exemptions from these duties under § 251(f). In its *Second Report and Order*, the FCC adopted rules to implement, *inter alia*, § 251(b)(3)'s requirement that LECs provide "dialing parity" to competing carriers, so that their customers do not have to dial extra digits to place calls.

5. The Eighth Circuit's Decisions. The incumbent LECs and a number of state utility commissions filed petitions for review of these orders, which were consolidated in the Eighth Circuit under 28 U.S.C. § 2112. The Eighth Circuit initially stayed the FCC's "pricing" and most-favored-nation regulations, and following briefing and argument, the Eighth Circuit vacated these regulations and a number of the FCC's other regulations.

First, the Court held that the FCC lacked "jurisdiction" to adopt regulations to implement the pricing requirements of § 251(c) and § 252(d) and some of the non-pricing requirements (*e.g.* § 251(b)(3)'s duty of dialing parity). The Court concluded that these are "intrastate communications services" within § 2(b) of the Act and that neither § 251(d)(1) nor the Act's many general grants of enforcement and rulemaking authority (*e.g.*, §§ 1, 4(i), 201(b), 208, or 303(r)) were sufficiently specific to override § 2(b)'s rule of construction and give the FCC jurisdiction over these "intrastate" requirements. Instead, the Eighth Circuit held that the FCC merely has the authority to adopt interpretative rules with respect to six subsections of § 251. App. 8a-24a; 85a.

The Eighth Circuit thus vacated the FCC's rules adopted in the *Second Report* to implement the dialing parity requirement of § 251(b)(3) (App. 81a-89a). It similarly vacated the rules adopted in the *First Report* that implemented the pricing requirements of § 251(c) and § 252(d), the requirement of § 252(a)(1) that interconnection agreements be filed, the exemptions of § 251(f), and the enforcement provisions of § 208. App. 8a-24a, 27a-30a, 30a-34a & 34a-35a.

Similarly, although the Eighth Circuit upheld the FCC's authority to adopt other regulations, it determined that the FCC's jurisdiction was limited to interpreting the specific requirements of the Act. The Eighth Circuit vacated all the FCC rules that were adopted and defended in Court not as interpretative rules, but as rules that reasonably implemented the statute's provisions and that were not inconsistent with any of its requirements. For example, one FCC rule provided that LECs are not obligated to

unbundle a network element when it is not technically feasible to do so, but the Eighth Circuit vacated this provision because there is no reference to "technical feasibility" in § 251(d)(2). App. 46a. Similarly, the FCC adopted rules that required LECs to implement the Act's nondiscrimination requirements by requiring them to provide "superior" access or to create new combinations of network elements when a new entrant would pay for them, but the Eighth Circuit vacated these rules because the Act does not expressly impose these obligations on LECs. App. 50a-52a & 52a-53a.

Second, the Eighth Circuit also invalidated some FCC rules that were adopted and defended as interpretations of the requirements of the Act. In particular, after initially upholding it, the Eighth Circuit, on rehearing, vacated the rule (47 C.F.R. § 51.315(b)) that provides that "an incumbent LEC shall not separate requested network elements" that are already combined within the LEC's network for the LEC's use. The Eighth Circuit held that LECs would not be providing the elements "on an unbundled basis" unless the LECs ripped apart the existing combinations. App. 71a.

Third, the Eighth Circuit similarly invalidated what it termed the FCC's "pick and choose rule" (47 C.F.R. § 51.809(a)), which was adopted to interpret § 252(i) of the Act. It allows new entrants to obtain interconnections, network elements, or wholesale services under the terms and conditions set forth in any approved agreement—without subscribing to the agreement as a whole.

6. The Pending Arbitrations and Arbitration Appeals. While the *First Report* and the *Second Report* were pending before the Eighth Circuit, over 100 separate arbitration proceedings were conducted under § 252. Over 70 of these have now been concluded and are the subject of pending review proceedings in federal district courts under 47 U.S.C. § 252(e)(6).

Because the FCC's pricing rules were stayed, state commissions made their pricing determinations in the

pending and concluded arbitrations on the basis of their own interpretations of the pricing requirements of § 251(c) and § 252(d). These interpretations generally followed those embodied in the FCC rules that were vacated solely on jurisdictional grounds. Thus, the question of the correct interpretation of the Act's pricing requirements is now at issue in the over 70 federal district court actions. By contrast, the FCC's bundling and other non-pricing rules were not stayed, so states were required to apply these rules in resolving open issues in arbitrations. For example, each of these arbitrations applied Rule 51.315(b), which the Eighth Circuit has now vacated. While federal district courts should stay proceedings pending this Court's decision, the Eighth Circuit's decision, when implemented, would require the reopening of over 70 interconnection agreements, and the development by states and the FCC of new rules and procedures to enable new entrants to "combine" network elements.

REASONS FOR ISSUING THE WRIT

The questions presented in this case possess profound national importance. The nation's telephone networks affect every home and business in the United States and are critical to the national economy. The Telecommunications Act of 1996 represents the first comprehensive legislative overhaul of national telecommunications policy since the enactment in the 19th Century of the Interstate Commerce Act (whose provisions were later codified by the Communications Act of 1934). While these Acts generally permitted local telephone systems to be operated as state-franchised monopolies, the 1996 Act establishes a new regulatory model in which today's local monopolies are to be rapidly transformed into competitive businesses.

To that end, the new local competition provisions of the Communications Act impose unprecedented federal obligations on incumbent local exchange carriers and on states to eliminate all economic and legal barriers to local competition so as to provide consumers with lower prices, more innovative services, and greater choices. There are

few matters that are more important to the nation than the effective implementation of this Act.

However, unless reviewed and reversed by this Court, the decisions of the Eighth Circuit will prevent the 1996 Act from achieving its objectives. The Eighth Circuit's jurisdictional holdings will consign the development of the critical national rules that are essential to the Act's immediate implementation to years of piecemeal litigation in federal courts across the country. It will immeasurably increase the uncertainty and costs imposed on new entrants and the time it will take them to enter, and will discourage some potential competitors from entering at all. Even more fundamentally, in the narrow areas in which the Eighth Circuit upheld the FCC's jurisdiction, it invalidated two regulations that critically implement the Act's goals, and those holdings will prevent effectuation of the Act's objective of widespread national competition to the incumbent monopolies even if the FCC's jurisdiction is restored. Each of these holdings, moreover, is contrary to the terms of the Act and to the decisions of this Court and other courts of appeals.

I. THE EIGHTH CIRCUIT'S JURISDICTIONAL HOLDINGS CONFLICT WITH THE DECISIONS OF THIS COURT AND NUMEROUS OTHER COURTS OF APPEALS.

The Eighth Circuit has held that the FCC has no enforcement or rulemaking authority over the pricing and other requirements that are among the principal determinants of whether and on what terms competitive carriers will be able to enter local markets, and that those matters were instead reserved exclusively for state commissions. The Eighth Circuit rested this holding on the ground—acknowledged to be unprecedented (App. 19a)—that the Communications Act preserves state agency jurisdiction even over provisions of that Act that unambiguously apply to intrastate services and that concededly preempt state law.

A. The Determination That The New Arrangements Are "Intrastate Communications Services" Within The Meaning Of § 2(b) Is Contrary To The Decisions Of This Court And Other Courts Of Appeals.

One major premise underlies all the Eighth Circuit's holdings: its determination that the interconnection, network elements, and other requirements of § 251 and § 252 are all "intrastate communications services" within the meaning of § 2(b) of the Communications Act. Because § 2(b) provides that no provision of the Communications Act is to be "construed" to "apply" or to give the FCC "jurisdiction" over such intrastate matters, this holding had two consequences under the Eighth Circuit's view of § 2(b). First, it led the Eighth Circuit to hold that the FCC could not enforce or adopt rules to implement any local competition requirement that unambiguously applied to intrastate services unless the Act also expressly gave the FCC jurisdiction over that requirement (which was found to be the case for only some subsections of §§ 251 and 252). Second, even for the subsections over which the FCC was held to have authority, the Eighth Circuit concluded that the FCC's jurisdiction was limited to adopting rules that interpret the specific language of those subsections of the Act, and that other FCC rules that reasonably implemented the Act's requirements and that were not contrary to any of its provisions were invalid. *Compare FCC* v. *Pottsville Broad. Co.*, 309 U.S. 134, 138 (1940), *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 178, 180-81 (1968), and *CCIA* v. *FCC*, 693 F.2d 198, 212-13 (D.C. Cir. 1982), *with* App. 46a-47a & 50a-53a and pp. 9-10, *supra*.

However, the Eighth Circuit determination under § 2(b) is contrary to the prior decisions of this Court and to the uniform decisions of other courts of appeals. They clearly establish that the local telephone facilities at issue are *not* intrastate communications services that are within the exclusive jurisdiction of States. Indeed, that is the teaching of the decision of this Court on which the Eighth

Circuit extensively relies: *Louisiana Pub. Serv. Comm'n* v. *FCC*, 476 U.S. 355 (1986). It recognized that local telephone facilities—*e.g.*, the wire that connects a home of a retail customer to a LEC's switch—are used to carry interstate as well as intrastate telephone calls. *Id.* at 373. Section 2(b) was applied in *Louisiana* only because the issue there was the authority of the FCC to set retail rates for individual intrastate calls and the Act separates the costs of local facilities into interstate and intrastate components to allow states to regulate those rates. 476 U.S. at 375-76. By contrast, the Court expressly declined to reject FCC jurisdiction when, as here, the LEC is providing an entire facility that will be inseverably used to provide interstate as well as intrastate services. *Id.* at 375 & n.4.

Contrary to the Eighth Circuit, other courts of appeals have uniformly held that § 2(b) is inapplicable in this circumstance. In particular, before the 1996 Act, courts all upheld the FCC's authority to foster the competitive provision of local telephone facilities by requiring LECs to allow interconnection or to provide components of their local networks on an unbundled basis and at competitively set and cost-based rates. That is the ground on which courts upheld the FCC rules that governed provision of telephone sets and other customer premises equipment, of inside wiring, and of enhanced services.[8]

In holding that the interconnection arrangements required by § 251 are intrastate services under § 2(b), the Eighth Circuit appeared to regard these other courts of appeals' decisions as distinguishable. The Eighth Circuit relied on the ground that the LEC facilities at issue are physically local and intrastate, that they are predominantly used for or "in connection with" intrastate services, and that the competitive provision of these facilities, in the Eighth Circuit's view, would have only a

[8] *See, e.g., NCUC* v. *FCC*, 537 F.2d 787, 791-94 (4th Cir. 1976); *NARUC* v. *FCC*, 880 F.2d 422, 431 (D.C. Cir. 1989); *California* v. *FCC*, 39 F.3d 919, 933 (9th Cir. 1994); *CCIA* v. *FCC*, 693 F.2d 198, 214-16 (D.C. Cir. 1982).

"tangential" impact on interstate services, which the Eighth Circuit stated was not "sufficient to overcome the operation of section 2(b)." App. 22a-23a.

But these are the precise grounds that other courts of appeals held to be insufficient to bar FCC jurisdiction. They have held that it is irrelevant that local telephone facilities are all "physically intrastate," for jurisdiction is determined by how the facilities are used, not where they are located. *NARUC* v. *FCC*, 746 F.2d 1492, 1496-1500 (D.C. Cir. 1984) (Bork, J.); *accord NCUC* v. *FCC*, 537 F.2d 787, 794 (4th Cir. 1976); *California* v. *FCC*, 4 F.3d 1505, 1513-1514 (9th Cir. 1993); *New York Tel. Co.* v. *FCC*, 631 F.2d 1059, 1065-66 (2d Cir. 1980). They have held it is irrelevant that local equipment is "used predominantly for intrastate calls" (*Puerto Rico Tel. Co.* v. *FCC*, 553 F.2d 694, 700 (1st Cir. 1977)), and FCC authority was upheld over telephone sets that were said to be used for intrastate calls 97% of the time. *NCUC* v. *FCC*, 537 F.2d at 791-94. Indeed, it is ironic that the Eighth Circuit would conclude that competition in local facilities would have only "tangential" effects on interstate services, for LECs receive over $20 billion and over 20% of their revenues from interstate services. Moreover, the FCC has elsewhere found that these interstate exchange access services are offered at rates that are substantially in excess of their costs and has relied on the measures that the Eighth Circuit invalidated to try to drive charges to competitive levels. See *Access Charge Reform*, 7 Comm. Reg. (P&F) 1209, ¶ 262 (1997).

Finally, the Eighth Circuit also cites the statutory provision that directs the separation of costs and investment for purposes of setting separate rates for interstate and intrastate *calls*. App. 20a. But if the Eighth Circuit's jurisdictional holding rests on this ground, it is contrary to the uniform decisions of other courts, to the terms of the Act, and to the FCC's uncontested findings.

Even before the 1996 Act was passed, courts had uniformly held that it is not possible to establish separate

interstate and intrastate requirements for the matters at issue under § 251 and § 252: the physical details of interconnection and access arrangements [4] or the pricing of *facilities* that users purchase in their entireties to provide interstate as well as intrastate services.[5] Indeed, as this Court's decision in *Louisiana* makes explicit, separation of costs and expenses is relevant only to ratemaking and only when ratemaking authority is divided between state and federal authorities based on particular uses of local or other telephone facilities. 476 U.S. at 375-76. Here, there is no such division in authority. Sections 251 and 252 require LECs to provide facilities to new entrants under a *single* set of rates, terms, and conditions that are initially determined by a *single* body (either a state commission or the FCC) and that apply regardless of the extent to which the new entrant offers interstate exchange access or intrastate exchange services.

Thus, all conceded before the FCC and the FCC found that there is no basis to divide the new interconnection arrangements into interstate and intrastate aspects. App. 194a-195a (¶ 92). For the same reason, if the FCC lacks jurisdiction to enforce and implement the new requirements, states would assume exclusive jurisdiction over facilities used for interstate as well as intrastate services, and the FCC would be stripped of its historic role over interstate services, contrary to the Act's plain terms.

B. Even If § 2(b) Applied, The Eighth Circuit's Jurisdictional Determinations Are Contrary To The Decisions Of This Court And Other Courts Of Appeals.

Further, even if § 2(b) were applicable, the Eighth Circuit's holding that the FCC lacks jurisdiction over all the requirements of sections 251 and 252 is contrary to

[4] *See, e.g., NCUC* v. *FCC*, 537 F.2d 787, 791-94 (4th Cir. 1976); *California* v. *FCC*, 39 F.3d 919, 933 (9th Cir. 1994).

[5] *See Hecht Co.* v. *Chesapeake & Potomac Tel. Co.*, 528 A.2d 474 (Md. 1987); *State Corp. Comm'n* v. *FCC*, 787 F.2d 1421, 1427-28 (10th Cir. 1986); *see also MTS & WATS Market Structure*, 4 F.C.C.R. 1352, *adopted*, 4 F.C.C.R. 5660 (1989); *CCIA* v. *FCC*, 693 F.2d 198, 214-18 (D.C. Cir. 1982).

the prior decisions of this Court and other courts of appeals. Indeed, the holding that the FCC lacks authority over unambiguous requirements of the Communications Act is unprecedented. It rests on the Eighth Circuit's belief that § 2(b)'s rule of construction requires courts to go through contortions to protect state jurisdiction by "construing" away explicit statutory grants of FCC authority.

The Eighth Circuit applied this jurisdictional theory to vacate numerous regulations adopted under §§ 251 and 252, but the Eighth Circuit's errors and its conflict with other decisions are graphically illustrated by its rulings on "dialing parity" and pricing. First, § 251(b)(3) of the Act requires LECs to "provide dialing parity to competing providers of telephone exchange service and telephone toll service" by allowing their customers to place calls by dialing the same number of digits as LEC customers. This is a requirement of the Communications Act that unambiguously applies to intrastate as well as interstate calling, so FCC jurisdiction is clear. *See Louisiana Pub. Servs. Comm'n* v. *FCC*, 476 U.S. 355, 370-74 (1986).

However, the Eighth Circuit went through a series of extraordinary measures to hold that no provision of the Act gives the FCC "jurisdiction" over this requirement. First, it dismissed § 251(d)(1) of the Act, which requires that "within six months following enactment of the [1996 Act], the [FCC] shall . . . establish regulations to implement the requirements of this section." While dialing parity is obviously a "requirement" of § 251(b)(3), the Eighth Circuit held that § 251(d) does not establish the FCC's authority to adopt regulations implementing all the requirements of § 251, but merely establishes a time limit for the adoption of regulations under six specific subsections of § 251 (*e.g.*, §§ 251(d)(2) and 251(c)(4)(B)), that specifically allude to FCC regulations and that the Eighth Circuit characterized as "call[ing] for the FCC's involvement" (App. 12a).

However, these six subsections do not grant any rulemaking authority at all. Instead, they *presume* (and thus confirm) that this authority is conferred elsewhere in the Act. For example, § 251(d)(2) does not authorize the adoption of rules, but merely requires the FCC to consider certain factors "[i]n determining what network elements should be made available for purposes of subsection [251](c)(3)." It thus sets some limits on the authority granted the FCC by § 251(d)(1) and the general rulemaking provisions of the Act. See also § 251(c)(4)(B) (incumbent LECs may not unreasonably limit resale "except that a State commission may, consistent with regulations prescribed by the Commission under this section," establish one particular limitation).

Further, even if § 251(d)(1) were not a grant of authority, the Communications Act contains a host of other provisions that expressly give the FCC authority to enforce and to adopt regulations to implement *all* the requirements of the Communications Act, including the newly-enacted provisions of §§ 251 and 252. See, *e.g.*, 47 U.S.C. § 151 (FCC "shall execute and enforce the provisions of this Act"); *id.* § 201(b) (FCC "may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act"); *id.* § 208 (FCC shall adjudicate complaints that "any common carrier subject to this Act" has acted "in contravention of the provisions thereof"). Thus, by codifying the new local competition requirements in the Communications Act, Congress expressly provided that they would be subject to the FCC's general enforcement and rulemaking authority.

However, because of its view of § 2(b), the Eighth Circuit went through contortions to "construe" each of these explicit grants of authority to be inapplicable to the new local competition provisions. For example, it concluded that the FCC's rulemaking authority under § 201*(b)* "is specifically limited to interstate or foreign communications services" because interstate and foreign services are the subject addressed by § 201(*a*). App. 12a.

But it is irrelevant that § 201(a) has a narrower scope than the Act as a whole, for § 201(b) expressly grants the FCC rulemaking authority to carry out the provisions "of this *Act*." Yet the Eighth Circuit effectively rewrote § 201(b) so that it would apply only to the provisions "of this section." Similarly, despite their unambiguous terms, the Eighth Circuit "construed" the Act's many other explicit grants of enforcement and rulemaking authority to be limited to the FCC's "traditional authority over interstate services" and inapplicable to the Act's local competition provisions. App. 12a-13a.

The Eighth Circuit applied this same rationale to deny the FCC jurisdiction to enforce or implement the pricing requirements of § 251. For example, §§ 251(c)(2) and (c)(3) require that incumbent LECs provide interconnection and unbundled network elements at *"rates,* terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement [adopted under § 252] and the requirements of this section and section 252." App. 100a. Thus, while States are charged with the responsibility of setting the specific rates to be charged by each LEC when they arbitrate interconnection agreements, state determinations of rates, like the other terms and conditions that are set by States, must comply with FCC rules that set forth the standards and methodologies that States are to apply to resolve all "open issues." § 252(c)(1). But for the reasons described above, the Eighth Circuit held that §§ 251(d), 201(b), and the other general grants of rulemaking and enforcement authority do not grant the FCC authority to adopt regulations that implement these pricing requirements.

In addition, the Eighth Circuit's holding on pricing accorded overriding weight to the *silence* of other provisions of the Act. In particular, it relied on the facts that § 252(c)(2) of the Act directs the states to set prices in accord with the pricing standards of § 252(d) and that § 252(d) makes no mention of FCC regulation. The Eighth Circuit concluded that the "absence

of any reference" to FCC rules in these sections "confirms . . . that Congress did not envision the FCC's participation." App. 13a. The Eighth Circuit did not explain how the silence of two isolated provisions could override the explicit grants of authority in § 251(d) and the Act's other provisions. Beyond that, other provisions in the Act preclude this negative inference and make it explicit that the FCC has authority to adopt rules to implement the Act's pricing requirements and to supplement the pricing standards of § 252(d). See 47 U.S.C. §§ 160, 251(d)(3), 251(e)(2), 251(g), 252(c)(1), & 253.

In short, the Eighth Circuit's jurisdictional holdings rested on the grounds that § 2(b) precludes a court from construing the provisions of the Act in accord with their ordinary meaning in the context of the Act as a whole and requires courts to contort and narrowly "construe" the Act's isolated terms in order to protect the states' "intrastate turf." This squarely conflicts with the decision of the D.C. Circuit in *Illinois Public Telecommunications Assoc.* v. *FCC*, 117 F.3d 555 (D.C. Cir. 1997). The D.C. Circuit there held that the grant of authority to establish regulations to "ensure that all payphone service providers are fairly *compensated* for each and every completed intrastate and interstate call" (47 U.S.C. § 276) confers jurisdiction on the FCC to preempt State authority over the *rates* charged for payphone calls. But the D.C. Circuit rejected claims that § 2(b) required the term "compensation" to be construed narrowly to refer (as it does in some other contexts) only to payments between carriers and not to "rates" paid by callers. Contrary to the Eighth Circuit's approach, the D.C. Circuit gave the terms of § 276 their natural meaning and breadth in light of the terms of the Act as a whole. 117 F.3d at 561-62.

Finally, it is ironic that the Eighth Circuit believed it was protecting "the states' intrastate turf" (App. 23a). Even under the Eighth Circuit's view of the law, the federal requirements of §§ 251 and 252 establish new federal law obligations that not only bind States, but also

subject their decisions to review under federal law standards in federal district courts. See 47 U.S.C. § 252(e)(6). Thus, even if the FCC lacked jurisdiction to adopt regulations to implement the federal pricing, dialing parity, and other new requirements, a single national determination would arise (after years or decades) once decisions of state commissions were reviewed by federal district courts, federal courts of appeals, or, in some instances, this Court. However, the reason Congress gives the FCC and other federal agencies general rulemaking authority is to allow the uniform national rules to be developed in a single proceeding (subject to judicial review under the Administrative Procedures Act), and Congress here granted the FCC the explicit authority and responsibility to adopt rules implementing all of § 251's and § 252's requirements within six months of their effective date.

II. THE EIGHTH CIRCUIT'S INVALIDATION OF RULE 51.315(b) IS CONTRARY TO THE UNIFORM DICTIONARY, JUDICIAL, AND REGULATORY DEFINITIONS OF THE STATUTORY TERM "UNBUNDLE," AND WILL CRIPPLE ONE OF THE ACT'S CENTRAL ENTRY VEHICLES.

Of even greater importance, even in those areas in which the Eighth Circuit upheld the FCC's jurisdiction, it vacated rules that are critical to achieving the Act's objectives of promoting meaningful competition and that were patently reasonable interpretations of the Act's requirements. Foremost, because of the time, expense, and infeasibility of constructing alternative telephone networks throughout the nation, the only entry vehicle that can permit the immediate, nationwide establishment of alternatives to LECs' exchange and exchange access services is for new entrants to obtain from the LECs essential components of telephone service at their economic cost and to use them to offer competing services. Thus, § 251(c)(3) requires incumbent LECs to offer new entrants nondiscriminatory access to "network elements" on an "unbundled" basis on rates, terms, and conditions that

are "just, reasonable, and nondiscriminatory" and cost-based. See 47 U.S.C. §§ 251(c)(3) & 252(d)(1). This is the method of entry which would be used by AT&T, MCI, and other carriers who lack ubiquitous local facilities.

The requirement of nondiscriminatory access was implemented by the FCC in Rule 51.315(b), which provides that "[e]xcept upon request, an incumbent LEC shall not separate requested network elements that the incumbent LEC currently combines." This rule was adopted because the FCC had specified that the LECs must offer seven components of their networks as "network elements," and each of those components is physically and electronically connected to some of the six other elements and is used by the LEC in these combinations. For example, each "local loop"—the wires that connect a customer's home or business to the telephone network—is physically connected to the "network interface device"—a small box at the home or business that the loop serves—and those two elements are used by the LEC in their combined form. Rule 51.315(b)'s prohibition on separating network elements implemented Section 251(c)(3)'s requirement that access to network elements be afforded on a "nondiscriminatory" basis: because the LECs use these elements in their combined form, their competitors must be afforded that same form of access.

Thus, if a LEC sent a technician to the customer's home gratuitously to disconnect physically the loop and the network interface device (or any other elements) every time a competitor ordered those combined elements, it would be engaging in the very discriminatory and anti-competitive conduct that the Act is designed to prevent. The effect of such action—and its sole purpose—would be to force the LEC's competitor to incur the expense and loss of goodwill generated by having to send its own technician to reconnect the elements while the competitor's customer waits without any telephone service. Thus, as the FCC has found, the LEC would be vandalizing its network for the sole purpose of "impos[ing] costs on competitive carriers that incumbent LECs would not incur," contrary to "the requirement of § 251(c)(3) that incumbent LECs provide nondiscriminatory access to unbundled elements." *Third Order on Reconsideration*, ¶ 44. And the effect on competition would be disabling: in addition to the added costs to competitors and their customers, it is obvious that few potential customers would be willing to switch away from the incumbent if it meant suffering service outages of indefinite duration while the new entrant tried to reestablish each of up to six separate physical connections between the elements.

These facts were undisputed below. But the Eighth Circuit vacated Rule 51.315(b) on the basis of its unexplained assertion that "unbundled" must mean "separated" or "uncombined," so that LECs could not provide network elements "on an unbundled basis" within the meaning of § 251(c)(3) unless the LECs separated the network elements from one another before furnishing them. The Eighth Circuit further stated that if the term "unbundled" were construed instead to permit new entrants to receive combinations of network elements, it "would obliterate the careful distinctions Congress has drawn in subsections 251(c)(3) and (4)" between entering the market through access to network elements and entering through resale of the incumbent LECs' services. App. 71a. The Eighth Circuit did not attempt to explain how its ruling could be reconciled with the nondiscrimination requirement of § 251(c)(3) or the accepted meaning of the term "unbundled."

Indeed, its holding is squarely contrary to the decisions of this Court, which required the Eighth Circuit to defer to the FCC's interpretation of "unbundle" if reasonable. *Chevron U.S.A., Inc.* v. *NRDC*, 467 U.S. 837, 842-43 (1984). And the reasonableness of that interpretation is decisively established by the fact that every judicial decision and other source of which petitioners are aware—none of which was even acknowledged by the Eighth Circuit—rejects the Eighth Circuit's interpretation of "unbundled" and supports the FCC's. They confirm that this term does not mean "physically separated." Rather, to

provide something on an "unbundled" basis is simply to state a separate price for it and to give users the *option* of declining to purchase it as part of a package.

Foremost, the FCC's interpretation embodies the dictionary definition. "Unbundle" is uniformly defined as "to separate the charges for related products and services usually sold as a package," with telephone services listed as an example.[6] That multiple dictionaries support the FCC's interpretation is itself conclusive of its reasonableness. See *National R.R. Passenger Corp.* v. *Boston & Me. Corp.*, 503 U.S. 407, 418-19 (1992). Indeed, the FCC cited these dictionary definitions in the *Notice of Proposed Rulemaking* that instituted this proceeding (*Local Competition*, 11 F.C.C.R. 14171, 14200 ¶ 86 & n.116 (1996)), and—with the *support* of the trade association of incumbent LECs[7]—then adopted rules that define "unbundled" in precisely this way. See also 47 C.F.R. § 51.307(d).

Further, that was the meaning of the term "unbundled" in the 20 years of prior regulatory decisions that had promoted competition in other components of telephone service and that had been the model for § 251(c)(3). In these decisions, the LECs' duty was to state a separate price for the specified components of their networks and to give customers the option of declining to obtain the component in combination with other LEC facilities or services. But when customers decided to continue to obtain the component from the LEC as part of a package, the LEC was neither required nor permitted to disassemble the element from the rest of its network and make the consumer incur the inconvenience, delay, and expense of recreating the combinations that previously existed.

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[6] *Random House Dictionary Of The English Language* 2005 (2d ed. Unab. 1981); *accord*, *Webster's New Collegiate Dictionary* 1263 (Merriam 1981) ("unbundle" is "to give separate *prices* for equipment and supporting services; to *price* separately") (emphases added); *American Heritage Dictionary* 1315 (2d Col. ed. 1991) ("unbundling" is "[t]he separate pricing of goods and services").

[7] Comments of USTA, 26 (May 16, 1996).

That was the rule when the FCC ordered—and courts affirmed—the "unbundling" of telephone sets and other customer premises equipment,[8] of inside wire,[9] of features used to provide enhanced services,[10] and of components of exchange access services.[11] That was also the rule in the "exchange access" provisions of the antitrust decrees that were entered in the 1980s and that have now been codified as FCC regulations by § 251(g) of the Act.[12] And that is also how courts have uniformly used the term in other industries.[13] In all these contexts, to unbundle is to promote competition by maximizing the choices and providing flexibility for new entrants, not to create inefficiencies for purchasers who order existing combinations. Yet, under the Eighth Circuit's holding, statutes and regulations ordering maximum unbundling are not, as their framers intended, pro-competitive, but instead perversely help incumbents *resist* competition by authorizing them to break apart facilities at the greatest number of points for the sole purpose of precluding competitive entry.

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[8] *Second Computer Inquiry*, 77 F.C.C.2d 384, 388, 443-44 (1980), *aff'd CCIA* v. *FCC*, 693 F.2d 198 (D.C. Cir. 1982).

[9] *Inside Wiring*, 59 Rad. Reg.2d 1143, 1151-53 (1986), *aff'd NARUC* v. *FCC*, 880 F.2d 422 (D.C. Cir. 1989).

[10] *Third Computer Inquiry*, 104 F.C.C.2d 958, 1064-66 (1986).

[11] *Expanded Interconnection*, 7 F.C.C.R. 7369 (1992).

[12] *United States* v. *American Tel. & Tel Co.*, 552 F. Supp. 131, 227, 232-234 (D.D.C. 1982), *aff'd sub nom.*, *Maryland* v. *United States*, 460 U.S. 1003 (1983); *United States* v. *GTE*, 603 F. Supp. 730, 743-46 (D.D.C. 1984).

[13] *See, e.g.*, *Northwest Pipeline Corp.* v. *FERC*, 61 F.3d 1479, 1482 (10th Cir. 1995) (distinguishing " 'bundled customers,' . . . who are charged a unitary rate," and " 'unbundled customers,' . . . who are charged separately for each component of service"); *Stinnett* v. *BellSouth*, No. Civ-2-92-207, 1993 U.S. Dist. LEXIS 21056, *6 (E.D. Tenn. 1993) ("unbundl[ing]" . . . means that "[charges are] listed separately on a customer's bill"); *In re Data Gen. Corp. Antitrust Litig.*, 490 F. Supp. 1089, 1105 (N.D. Cal. 1980) ("[a]t least three companies that market both software and CPUs make their software available on an 'unbundled' basis, *i.e.*, without also requiring the purchase of their own CPUs").

There is similarly no basis for the Eighth Circuit's conclusion that the FCC's definition of unbundled would somehow "obliterate the careful distinctions" between network elements under § 251(c)(3) and resale under § 251(c)(4). App. 71a. These remain separate entry vehicles that present different costs, different risks, and different opportunities. As the Eighth Circuit correctly stated elsewhere in its opinion, purchasers of combinations of network elements make "up-front investments" that resellers do not, and users of network elements incur different risks than resellers for this reason alone. App. 56a. Moreover, a firm that uses network elements is unlike a reseller in that it can offer not merely retail exchange services but also exchange access services, as well as new and innovative services that the LEC does not offer at all. App. 244a-245a.

Beyond that, the Eighth Circuit fundamentally misapprehended Congress' purpose in establishing multiple entry vehicles for new entrants. As the FCC found, Congress' purpose was not to "express[] a preference for one particular entry strategy," but to create alternative paths that new entrants could employ "as market conditions and access to capital permit." App. 137a-138a. For these and other reasons, the FCC found as a fact, on the basis of a voluminous record, that network elements and resale establish two entirely distinct modes of entry, that each presents new entrants with a different mix of "opportunities" and "risks," and that neither undermines the viability of the other. App. 243a-244a. The Eighth Circuit never even addressed these findings, much less held that they failed to rest on "substantial evidence." See 5 U.S.C. § 706(2). Instead, the court impermissibly substituted its uninformed economic speculations for findings of the expert agency.

Finally, it is a matter of the utmost national importance that this aspect of the Eighth Circuit's decision be now reviewed by this Court and reversed. If LECs were entitled to rip apart existing combinations of network elements, they would be imposing increased costs on competitors and service disruptions on customers that would

flatly preclude the use of network elements to offer competing local services to some classes of customers, and it would remain to be seen whether it could be made feasible for *any* classes of customers.

That would have devastating effects on the achievement of the Act's objectives. Congress made network element competition a distinct mode of entry because it alone can permit the immediate nationwide offering of competitive alternatives to the full range of LEC services. By contrast, a firm that resells LEC services under § 251(c)(4) cannot offer exchange access and is limited to mimicking the LEC's retail services. Similarly, the construction of redundant alternative local networks is not economic in many parts of the nation, will take years or decades to establish in others, and further may not emerge in many areas unless new entrants can first use combinations of network elements. Under the Eighth Circuit's holding, therefore, full-fledged local competition will be certain only in the future and only for the limited number of customers who reside in areas where new entrants (such as cable TV firms) find it economical to establish alternative local networks on their own, without first using combinations of network elements.

The importance of network element competition is starkly confirmed by the FCC's recently-adopted plan to reform the LECs' interstate exchange access charges which generate over $20 billion annually and have been found by the FCC to be priced substantially in excess of their costs. This plan centrally rests on the now-precarious assumption that network element competition would be effective. *See Access Charge Reform*, 7 Comm. Reg. (P&F) 1209, ¶ 262 (1997).

Further, even if network element competition were to remain feasible for some customers after the Eighth Circuit's decision, it could develop only after a lengthy and punishing delay that would itself defeat the objects of the 1996 Act. The LECs are now demanding that hundreds of agreements that were entered into prior to the court of

appeals' decision vacating Rule 51.315(b) be redone, and in all events substitute mechanisms would have to be developed to enable new entrants to reconnect the elements that the LECs disassemble. In short, whether or not the Eighth Circuit's jurisdictional holdings are reviewed, it is critical to the effectuation of landmark federal legislation that the Court grant certiorari to review and reverse the Eighth Circuit's decision to vacate 47 C.F.R. § 51.315(b).

III. THE DECISION TO VACATE THE FCC'S RULE IMPLEMENTING SECTION 252(i) DISREGARDED THE ACT'S PLAIN LANGUAGE, THE FCC'S FINDINGS, AND *CHEVRON*.

Section 252(i) requires an incumbent LEC to "make available *any interconnection, service, or network element* provided *under* an agreement . . . to which it is a party to any other requesting carrier upon the same terms and conditions as those provided in the agreement." 47 U.S.C. § 252(i) (emphasis added). This provision imposes a conventional "most-favored-nation" mechanism that implements the Act's nondiscrimination requirement, by ensuring that services or elements made available to one carrier be made available to other carriers on the same terms and conditions. The FCC applied § 252(i) in light of its language and self-evident purpose, and concluded that it required incumbents to make available to requesting carriers "any individual interconnection, service, or network element arrangement contained in an agreement . . . upon the same rates, terms, and conditions as those provided in the agreement." See 47 C.F.R. § 51.809(a); App. 261a-268a; 336a.

The court of appeals vacated this regulation, concluding that the Act did not entitle new entrants to obtain individual interconnection, service, or network element arrangements contained in other agreements, but merely entitled them to take an agreement in its entirety. The court could so hold only by declining to apply the plain language of the Act. Indeed, the words of the FCC rule

and § 252(i) are virtually identical. And as the FCC concluded, "Congress drew a distinction between 'any interconnection, service, or network element[s] provided under an agreement,' which the statute lists individually, and agreements in their totality." App. 261a. Remarkably, the Eighth Circuit "acknowledge[d] that the words 'any interconnection, service, or network element' could indicate that the FCC's approach was intended by Congress" (App. 25a n.22). Under *Chevron*, that should have ended the matter.

The court nonetheless overrode the statute's text because it believed that the Act indicates a "preference" for concluding agreements by "voluntary negotiation" rather than arbitration, that a LEC's willingness to negotiate would be "severely stifled" by the FCC's rule, and that the rule therefore "conflict[ed] with the Act's design." App. 25a-26a. But these conclusions were baseless.

First, the Act does not embody any overriding preference for negotiations. It establishes a four-month period in which LECs and their potential competitors could attempt to negotiate agreements, and then provides for expeditious arbitrations whenever those negotiations fail to reach agreement. See § 252(b)(1). Second, even if there were such a preference, it would not nullify the central nondiscrimination policy established by Congress in § 252(i) and elsewhere in the Act, and *Chevron* deference " 'has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies.' " *Chevron*, 467 U.S. at 844 (citation omitted). Third, and in all events, the FCC found that its rule would in fact hasten, not hinder, the process of reaching interconnection agreements, and this finding was well supported and entitled to deference. App. 263a-264a.[14]

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[14] The court rejected the FCC's finding based on its unsupported belief that anticompetitive behavior by the LECs in negotiations is unlikely because the "LECs have as much interest in avoiding the costs of prolonged negotiations or arbitrations as do the requesting carriers." App. 27a. But as the FCC explained, these are not

In short, here, too, the Eighth Circuit overstepped its role by failing to give effect to the statute's natural meaning and failing to give deference to FCC findings that accorded with that natural meaning. Moreover, the consequences of that failure are substantial. As the FCC found, an "entire agreement" reached with one new entrant is highly unlikely to accord with the business plans of another, and the incumbent LEC can in any event insert provisions to ensure that any agreement with one party is useless to any other party. As a result, the court's reading "eviscerate[s] the obligation Congress imposed in section 252(i)," and will cause competitive harm that will fall especially upon "smaller carriers who lack bargaining power." App. 262a-263a.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

MARK C. ROSENBLUM
ROY E. HOFFINGER
295 North Maple Avenue
Basking Ridge, NJ 07920
(908) 221-3539

DAVID W. CARPENTER *
PETER D. KEISLER
SIDLEY & AUSTIN
One First National Plaza
Chicago, IL 60603
(312) 853-7237

Counsel for AT&T Corp.

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* Counsel of Record

"traditional commercial negotiations in which each party owns or controls something the other party desires." App. 167a. Incumbent LECs "have strong incentives to resist [their] obligations" under the Act, and thus have every incentive to prolong the process of reaching agreements and thereby delay the day when they will face competition. *Id.*

DANA FRIX
SWIDLER & BERLIN, CHARTERED
3000 K Street, N.W.
Suite 300
Washington, DC 20007
(202) 424-7500
Counsel for ACC Corp.

CHARLES H. HELEIN
ROBERT M. MCDOWELL
HARISHA J. BASTIAMPILLAI
HELEIN & ASSOCIATES, P.C.
8180 Greensboro Drive
Suite 700
McLean, Virginia 22102
(703) 714-1300
Counsel for America's Carriers Telecommunications Association

GENEVIEVE MORELLI
1140 Connecticut Avenue, N.W.
Suite 220
Washington, DC 20036

ROBERT J. AAMOTH
EDWARD A. YORKGITIS, JR.
KELLEY DRYE & WARREN LLP
1200 19th Street, N.W.
Suite 500
Washington, DC 20036
(202) 955-9600
Counsel for Competitive Telecommunications Association

JAMES M. SMITH
Vice-President-Law and Public Policy
3000 K Street, N.W.
Suite 300
Washington, DC 20007

DANA FRIX
RUSSELL M. BLAU
SWIDLER & BERLIN, CHARTERED
3000 K Street, N.W.
Suite 300
Washington, DC 20007
(202) 424-7500
Counsel for Excel Telecommunications, Inc.

JAMES R. JACKSON, JR.
GENERAL COMMUNICATIONS, INC.
2550 Denali Street
Suite 1000
Anchorage, AK 99503
(907) 265-5545
Counsel for General Communications, Inc.

DANIEL L. BRENNER
NEAL M. GOLDBERG
DAVID L. NICOLL
1724 Massachusetts Ave., N.W.
Washington, DC 20036
(202) 775-3664
Counsel for National Cable Television Association

LEON M. KESTENBAUM
JAY C. KEITHLEY
H. RICHARD JUHNKE
1850 M Street, N.W.
11th Floor
Washington, DC 20036
(202) 828-7437
Counsel for Sprint Corporation

CHARLES C. HUNTER
CATHERINE M. HANNAN
HUNTER COMMUNICATIONS LAW GROUP, P.C.
1620 I Street, N.W.
Suite 701
Washington, DC 20006
(202) 293-2500
Counsel for Telecommunications Resellers Association

CATHERINE R. SLOAN
RICHARD L. FRUCHTERMAN, III
RICHARD S. WHITT
1120 Connecticut Avenue, N.W.
Suite 400
Washington, DC 20036
(202) 776-1550
Counsel for WorldCom, Inc.